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11 Attorneys for Defendants William Tull, Daniel Gibby and
12 Gibby Novelties, LLC

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30 MONTWILL V. TULL, ET AL. USDC Action No. C 07 3947 SI
31

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AUTHORITIES

Cases

<i>Funky Films, Inc. v. Time Warner Entertainment Co., L.P.</i> , 462 F.3d. 1072 (9 th Cir. 2006)	14
<i>The Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.</i> , 374 F. Supp. 355 (SDNY 2005), affirmed under the same name in 466 F. 3 rd 97 (C.A. N.Y. 2006).	10

Statutes

11 U.S.C. § 106(3)
11 U.S.C. § 109(a)
17 U.S.C.A. §102(b)
Local Rule 6-1(b)
Local Rule 6-3
Local Rule 7-2(c)
General Order 45 (VI)

Other Authority

M Nimmer & D. Nimmer, *Nimmer on Copyright* (2007) 14

1 **Declaration/Affidavit**

2 William Tull

3 Exhibits: K. Montwillo's Schedule K-1 statements from Arsenic & Apple Pie for 1999, 2000,
4 2002 and 2003;

5 L. Certified Mail Receipts for Schedule K-1 statements for 2002, 2003 and 2004

6 Daniel Gibby

7 David Y. Wong

8 Exhibits: 1. Letter to Sommers of April 8, 2008

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7 Attorneys for Defendants William Tull, Daniel Gibby and
 8 Gibby Novelties, LLC

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 PAUL MONTWILLO, an individual) CASE NO. C 07 3947 SI
 12)
 Plaintiff,) Reply Memorandum of Defendants William Tull,
 13) Daniel Gibby and Gibby Novelties, LLC to
 vs.) Plaintiff's Opposition to Defendants' Motion for
 14) Summary Judgment; Declarations of William
 15) Tull, Daniel Gibby and David Y. Wong in
 WILLIAM TULL; DANIEL GIBBY;) Support Thereof
 16) (FRCP RULE 56(C)
 GIBBY NOVELTIES, LLC dba ARSENIC)
 & APPLE PIE, a California Limited) April 25, 2008
 17) Liability Corporation and DOES 1 through
 20, inclusive,) 9:00 a.m.
 18) Defendants.) Judge Susan Illston, Courtroom 10

19 And related Counter-Claim

The Federal Building
 450 Golden Gate Avenue
 San Francisco, CA 94102

22 Complaint filed: August 1, 2007

25 Defendants William Tull, Daniel Gibby and Gibby Novelties, LLC, hereby submit their
 26 Reply Memorandum of Points and Authorities to Plaintiff's Opposition to Defendants' Motion for
 27 Summary Judgment.

28 MONTWILL V. TULL, ET AL. USDC Action No. C 07 3947 SI

Defendants' Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment

1. **PROCEDURAL OBJECTIONS TO PLAINTIFF'S OPPOSITION MEMORANDUM**

2 The procedural violations of Plaintiff have rendered it nearly impossible for Defendants
 3 to fully respond to Plaintiff's Opposition to Defendants' Motion for Summary Judgment. Not only
 4 have these violations placed Defendants at a severe disadvantage, this is the *third* time in less
 5 than a month¹ that Plaintiff's Counsel has flagrantly ignored and violated the Rules of Civil
 6 Procedure and the Court's Local Rules. Defendants object and ask that the Court disregard
 7 and strike from the record Plaintiff's Memorandum of Points and Authorities in Opposition to
 8 Defendants' Motion for Summary Judgment.

9 On March 21, 2008, Defendants filed their Motion for Summary Judgment as per the
 10 Pretrial Preparation Order issued by the Court on November 16, 2007, and affirmed on March
 11 14, 2008. Said Order provided that any Opposition must be filed by April 4, 2008. On the
 12 evening of April 4, Plaintiff electronically filed a Supplemental Declaration in Opposition to
 13 Defendants' Motion, but did not file Plaintiff's Opposition Memorandum of Points and
 14 Authorities, electronically or otherwise.

15 On April 8, 2008, after Defense Counsel advised that Plaintiff's Opposition did not
 16 appear to have been filed, Plaintiff electronically filed his Opposition Memorandum without a
 17 Court Order.

18 An attempt to file documents electronically does not alter any filing deadlines. "All
 19 electronic transmissions of documents must be completed (i.e., received completely by the
 20 Clerk's Office) prior to midnight in order to be considered timely filed that day. Where a specific
 21 time of day deadline is set by Court order or stipulation, the electronic filing shall be completed
 22

23
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 25
 26 ¹ On March 6, 2008, Plaintiff's Counsel was verbally chastised by Judge Mahoney of the California Superior
 27 Court at the hearing of these Defendants' Motion for Attorneys Fees for attempting to file and submit a lengthy "Reply
 28 to Defendants' Reply" on the morning of the hearing of Defendants' successful motion.

On the evening of March 21, 2008, Plaintiff filed a Motion for Summary Judgment electronically, but failed to
 file or serve his supporting Declaration. On March 24, he manually filed the document but failed to serve it on
 Opposing Counsel until after Defendants' Opposition to Plaintiff's Motion was filed on April 3, 2008.

1 by that time." General Order 45 (VI)(D).

2 In the event that a party fails to comply with a deadline for filing, the Civil Local Rules
3 provide for only one means of seeking relief: by Court Order. Rule 6-1(b) provides that a court
4 order is only means of extending the time for filing papers with the court when the deadline has
5 already been fixed by court order. It provides as follows:

6
7 "b) When Court Order Necessary to Change Time. A Court order is required for any
8 enlargement or shortening of time that alters an event or deadline already fixed by Court
9 order or that involves papers required to be filed or lodged with the Court (other than an
10 initial response to the complaint). A request for a Court order enlarging or shortening
11 time may be made by written stipulation pursuant to Civil L.R. 6-2 or motion pursuant to
12 Civil L.R. 6-3. Any stipulated request or motion which affects a hearing or proceeding on
13 the Court's calendar must be filed no later than 10 days before the scheduled event."

14
15 In the instant matter, not only has Plaintiff failed and refused to obtain a Court Order
16 enlarging the time for filing his Opposition to Defendants' Motion for Summary Judgment,
17 Plaintiff made no effort to present a motion as called for under Rule 6-3, denying Defendants
18 their right to properly object to the late filing. In fact, his Counsel never attempted to seek a
19 stipulated request to extend the time. Instead, as he has done in the past, Plaintiff's Counsel
simply ignored the Court's Orders and Rules and proceeded to file Plaintiff's Opposition as if the
briefing schedule applies to everyone, except Plaintiff.

20 Moreover, Plaintiff's violations of the FRCP and Local Rules have stymied and
21 substantially prejudiced Defendants in that they have been denied the legally- mandated period
22 of time in which to prepare and file their Reply to Plaintiff's Opposition. Through no fault of
23 Defendants, the time provided for the preparation of their Reply to Plaintiff's Opposition has
24 been cut nearly in half, from seven calendar days to a less than four. The result is that
25 Defendants have been forced to reply to Plaintiff's Opposition with barely enough time to
26 analyze and digest its arguments, let alone prepare a comprehensive Reply to same. If
27 permitted to stand, the prejudice to Defendants is and will be fertile grounds for appeal.

1 Based on Plaintiff's obvious disregard for and violation of the Federal Rules of Civil
2 Procedure and Local Court Rules, evidenced by the failure of Plaintiff to file his Opposition
3 within the deadline imposed by the Court, his failure and refusal to seek or present a motion to
4 extend the filing deadline, cavalier filing of his Opposition four days after the deadline, and the
5 substantial prejudice to Defendants resulting from inadequate notice, Defendants object to and
6 move to strike from consideration the late filed and untimely served Opposition of Plaintiff to
7 Defendants' Motion for Summary Judgment. Defendants thus urge this Court to grant
8 Defendants' Motion for Summary Judgment based on the absence of any filed Opposition to
9 Defendants' Motion.

11

12 **2. SUMMARY JUDGMENT IS PROPER BECAUSE PLAINTIFF'S SOLE CLAIM OF**
13 **COPYRIGHT INFRINGEMENT IS BARRED BY THE THREE-YEAR STATUTE OF**
14 **LIMITATIONS.**

15 In his Opposition, Plaintiff attempts to argue that his letter of July 13, 2004, should not
16 serve as the starting date of his infringement claim against Defendants because he addressed
17 the letter to Counsel for Arsenic & Apple Pie, LLC, not the specific defendants in this action.
18 The argument is completely without merit.

20 As conceded by both sides, Arsenic & Apple Pie was dissolved and terminated as a
21 result of managing member Paul Montwillo's bankruptcy petition. As part of the windup of the
22 Company, Tull received all of the Company's assets, both tangible and intangible, including the
23 left over doll inventory, their intellectual property rights, and the rights to the Arsenic & Apple Pie
24 business and trademark. These assets were then sold by Tull to Gibby on July 15, 2004 for
25 monetary consideration.

27 At the same time, Plaintiff asserted his exclusive ownership interest to all five dolls in a
28 letter dated July 13, 2004. In the letter, Montwillo offered to sell an exclusive license to the

1 dolls, not just to Arsenic, but also to Arsenic's other member, Defendant Tull. He then
2 specifically identified each of the dolls to which he claimed the copyrights to: "Trailer Trash Doll,
3 Blonde Drag Queen, Red Head Drag Queen, Talking Pregnant Trailer Trash Doll and Male
4 Mullet Trailer Trash Doll," and admits in his deposition that he viewed this letter as notice to
5 "...them that they were violating [his] copyright" Montwillo Deposition 107:23-108:1.
6

7 Given the foregoing, it is false and hypocritical for Plaintiff to claim that his July 13 letter
8 was anything other than a blanket notice to Arsenic and Tull that he alone claimed the
9 copyrights to the subject dolls. Hence, when Plaintiff testified at deposition that he viewed the
10 letter as notice to "them" that they were violating his copyrights, it establishes beyond any doubt
11 that he knew, appreciated, and was aware of his rights, and placed Arsenic and Tull on notice of
12 his belief and claim that his copyrights were being infringed upon.

13 Moreover, Plaintiff's efforts to claim that there were "series of infringements", about which
14 Montwillo found out "months after August 1st", is merely an effort to rewrite the allegations of the
15 complaint. In fact, the Complaint alleges only that after the dissolution of Arsenic & Apple Pie:

16 "13. ...defendants Tull and Gibby formed Gibby Novelties, LLC and continued to sell
17 novelty dolls which are identical in almost all respects to the dolls subject to the Doll
18 Design Copyrights owned by Montwillo.
19

20 14. Defendants, without authorization from Montwillo, continue to manufacture, market,
21 distribute and sell their line of infringing doll designs which are virtually exact
22 reproductions of the doll designs owned by Montwillo and subject to the doll design
23 copyrights."

24 Without qualification, Defendants observe that there is no allegation of multiple infringing acts at
25 any specific dates and times, other than that the alleged infringing activity began "*after the*
26 *dissolution of the LLC*". That event happened in July 2004, and when Montwillo received notice
27 of the dissolution, he raised his claim of copyright infringement in his July 13th letter. These
28

1 facts support the position that the three year limitations period started in July 04, and not at any
2 later date.

3 Finally, as to the male and pregnant dolls, only one of which existed in prototype form,
4 ownership rights to them were transferred to Tull with the dissolution of the company, at the
5 same time that Montwillo claimed ownership, along with the other three designs, in July of 2004.
6 Defendants thus assert that while the subject dolls made by Gibby Novelties, LLC are not the
7 same or derived from Montwillo's designs, the notice Montwillo gave Tull and Gibby in July of
8 2004 covered those designs, and started the three-year statute running. Based on these
9 undisputed facts, the statute commenced in July of 2004, and expired in July of 2007, a least
10 two weeks before this action was filed.

12 Using July 13, 2004 as the date of accrual, the last possible date that Plaintiff could have
13 lawfully sued for copyright infringement was July 13, 2007. Plaintiff, however, did not initiate
14 this action for copyright infringement until August 1, 2007, several weeks after the expiration of
15 the three year statute of limitations for copyright infringement. As a matter of law, Defendants
16 are entitled to summary judgment on the sole cause of action contained in Plaintiff's Complaint.
17

18

19 **3. DEFENDANT GIBBY IS PROTECTED BY THE FIRST SALE DOCTRINE**

20 The fact that the left-over Trailer Trash Doll models acquired from Arsenic by Tull, i.e.
21 the original Trailer Trash Doll, Blonde and Redhead Drag Queen Dolls, have not been
22 produced, manufactured or copied by Gibby or Gibby Novelties, LLC (See Affidavit of Daniel
23 Gibby, Paragraph 4), further undercuts any argument of copyright infringement that Plaintiff may
24 offer against Gibby or Gibby Novelties, LLC. Since Plaintiff has put forth no evidence that any
25 of the three aforementioned dolls were manufactured after July of 2004, then the law is clear
26 that as to those dolls, there is no infringing event.
27

1 Plaintiff admits that Arsenic had a license to produce and distribute the dolls while he
2 was a member (Deposition of Montwillo 44:8-45:20). Hence, Plaintiff asserts and Defendants,
3 for sake of argument will agree, that any dolls manufactured by Arsenic and offered for sale
4 were done so under the authority of that license. When the unsold inventory was sold to Tull in
5 consideration of his retirement of his loans, the sale of the dolls to Tull effectively terminates any
6 further claim of infringement. Under 17 U.S.C.A. §§ 106(3) and 109(a), the "first sale" doctrine
7 provides that a sale of a lawfully made copy terminates the copyright holder's authority to
8 control or interfere with subsequent sales or distribution of that copy. In other words, the
9 subsequent transfer of sale of the same doll inventory does not create a new copyright
10 infringement against Gibby of Gibby Novelties, LLC.

12

13 **4. PLAINTIFF'S DUAL CLAIMS THAT THE DOLL DESIGNS AT ISSUE WERE**
14 **CREATED BEFORE THE ARSENIC AND APPLE PIE BUSINESSES BEGAN AND**
15 **THAT HE NEVER TRANSFERRED THOSE DESIGNS TO THE COMPANY, ARE**
16 **CONTRADICTED BY THE UNDISPUTED FACTS OF THIS CASE**

17

18 **a. Plaintiff's Creation Arguments Confuse Unprotected Ideas With Protectible**
Expression of Ideas

19

20 There has been much confusion generated in this case regarding Plaintiff's claims of
21 creation of the doll designs at issue in or around 1996. Plaintiff claims, and supports his claims
22 with newspaper clippings, that he created the Trailer Trash Doll and the Drag Queen Dolls in or
23 before 1996, and sold them in Defendant Tull's store in 1996. Based on this claim, he asserts
24 that he established a copyright ownership before entering into the partnership (1997) or LLC
25 (1999) with defendants.

26 The confusion here appears to stem from a blurring of the distinction between idea and
27 expression under copyright law. There is no dispute that Plaintiff came up with the idea of
28

1 Trailer Trash Dolls and Drag Queen Dolls before entering into a business relationship with
 2 Defendant Tull. This acknowledgment does not, however, concede that these ideas, or their
 3 initial expression, contain sufficient originality to warrant protection as intellectual property.

4 The unprotectible idea of trailer trash and drag queen dolls was first expressed by
 5 Plaintiff prior to 1997, in the form of the dolls that utilized Barbie doll bodies, and resulted in
 6 Plaintiff and Defendant Tull being sued by Mattel. Those designs cannot be, and are not, the
 7 subject of this litigation. They were derivative works that violated Mattel's copyright and for
 8 Plaintiff to claim a copyright interest in same would not only be disingenuous given his consent
 9 to Mattel's injunction, but would most certainly give rise to another lawsuit against Plaintiff by
 10 Mattel concerning whose copyrights have been infringed.

11 In truth, what is at issue in this case is the second generation of Trailer Trash Dolls
 12 created by Montwillo *after* he entered into partnership with Defendant Tull in July of 1997. Even
 13 Plaintiff Montwillo is forced to admit as much in that each of the questionable copyright
 14 registrations he submitted in 2004, clearly states the date of creation of all five of the designs
 15 as: "1998".

16 In view of this fact, the inquiry in this motion must then shift to the question of whether
 17 there is any triable issue of fact that when Montwillo entered into the partnership and then the
 18 LLC, of Arsenic and Apple Pie, did he, either through direct action, or inaction, transfer any
 19 copyright rights that may have existed in these designs, to the LLC. The evidence all suggests
 20 that he did knowingly effect such a transfer.

22 **b. The Operating Agreement Language, and the *Graham* Decision, Support
 23 Defendants' Claim That Plaintiff Agreed to Create Doll Designs for the LLC,
 24 and Not For His Own Benefit**

25 Plaintiff argues that Section 2.7 of the LLC Operating Agreement, which restates the
 26 duties of the co-owners in the same language that existed in their partnership agreement, does
 27 not constitute a conveyance of rights to the designs to the business. He argues that for such a

1 transfer to have been made, the language would have to be clearer – all the language at issue
2 does, he argues, is delineate managerial responsibility. On closer examination, this argument
3 lacks merit and is not persuasive.

4 Section 2.7 of the Operating Agreement provides that Montwillo is “in charge of art
5 direction, design and advertising of product line, including but not limited to corporate
6 identification, product design, packaging, website design, website maintenance and print
7 advertising”. Plaintiff argues that this language does not effect a transfer of any intellectual
8 property rights. In order for this to be true, Plaintiff would ask this Court to rewrite the clause to
9 read as follows:

10 “Montwillo will be in charge of art direction, design and advertising of a product line
11 *which is his sole and exclusive intellectual property*, including but not limited to corporate
12 identification, product design, packaging, website design, website maintenance and print
13 advertising, *all of which he will own*. *Arsenic will not own its corporate identification, or*
14 *its product design. Montwillo will own those items, and upon his departure from Arsenic*
15 *for any reason, all business activity of Arsenic must cease, since it does not own the*
16 *design of its products, advertising, or website.*” (Plaintiff’s desired text in italics)

18
19 To state the added text desired by Plaintiff illustrates the absurdity of his claim. The reason the
20 original clause evidences the transfer of any rights owned in the design, is that if Montwillo is
21 responsible for creating product designs, for whom other than Arsenic could it be reasonably
22 presumed he is doing this work for? In essence, Montwillo’s agreement to accept sole
23 responsibility for creating product designs for Arsenic in exchange for an ownership interest
24 necessarily and logically means that any products he then designs are the property of the
25 Company. It is because the clause can only be reasonably read as a reflection of Montwillo’s
26 commitment to design products for Arsenic, that it serves as evidence of a transfer of any
27
28

1 existing and all future design rights to the company, absent an express reservation of those
 2 rights.

3 Regarding Montwillo's claim that he insisted on the removal of alleged transfer of rights
 4 language in the LLC Operating Agreement, this claim should be disregarded by the Court, as
 5 Montwillo has admitted², that he not only has no documentation of the language he wanted
 6 removed or any correspondence referring to the edits, he further can not even recall the specific
 7 language he requested be removed. Instead, the Affidavit of Defendant Tull filed in this matter
 8 firmly establishes that no such deletion was ever suggested, requested, proposed, or made.

9
 10 Turning to the "work for hire" issue, Plaintiff's attempt to distinguish his situation with that
 11 of Martha Graham fails. The situations are analogous for a number of reasons:

12 1. Both Graham and Montwillo were both the creative forces at work in their respective
 13 companies. While Graham was carried on the books of the Martha Graham Foundation
 14 as an employee, it is undisputed that she was a lot more than a typical employee of the
 15 foundation. It existed to allow her to create and promote her dance choreography. It
 16 serves, in that sense, much more like a typical "loan-out" company in the entertainment
 17 business. The employee of the loan-out company is the artist, who also functions as the
 18 principal shareholder, and therefore "owner", of the company.
 19

20 2. Similarly, Montwillo was a half owner of Arsenic & Apple Pie, LLC, as evidenced by his
 21 testimony and the Tax Schedule K's, as well as its sole creative influence. (See, Affidavit
 22 of Tull in support of this Reply). Plaintiff received partnership and K-1 statements from
 23 the LLC indicating income allocated to him by the entity. Because operating expenses
 24 exceeded income, he received no "paychecks" from the company, but on the other hand,
 25 he admitted in his deposition that he never received any royalty payments, either.

27
 28 ² Cited in Defendants' Opposition to Plaintiff's summary judgment motion,

1 Hence, while Montwillo may not have been the recipient of a steady stream of income
2 based on a salary or profits generated, he did receive and undoubtedly claimed a
3 monetary benefit in the form of a deductible loss which reduced his tax liability from his
4 other forms of income. Hence, it is false misleading for Plaintiff to claim that he was not
5 an "employee" merely because he did not receive a salary or insurance benefits. As an
6 owner in the business, he clearly received benefits above and beyond hourly
7 compensation.

8

9 3. Furthermore, although Montwillo claims to have exercised complete control over his
10 areas of responsibility in the LLC, the undisputed facts indicate otherwise. Montwillo had
11 to work with a Chinese company on the manufacturing process for the dolls and their
12 packaging. All of the funding for that work came from the LLC. The cost of all materials
13 used in the doll designs also came from the LLC. In short, all of Montwillo's design work
14 on the dolls was, per the terms of the Operating Agreement, done for the benefit and use
15 of the LLC. To demonstrate this point more precisely, Montwillo and Tull both agree that
16 work on a talking pregnant doll was started but placed on hold due to the financial
17 condition of the LLC. If Montwillo, as he asserts, were unconstrained by the limitations
18 and finances of the LLC, then why would he stop production work on a new doll? The
19 answer is clear, he had no choice because all work had to be approved and paid for by
20 the LLC. Thus, the facts clearly show that he did not exercise complete control over his
21 design duties.

22

23 4. Finally, Montwillo cites no other entity for whom he designed dolls during the times at
24 issue. Indeed, Plaintiff until his entry into a partnership and an LLC with Tull, had never
25 designed dolls or toys before. Since the dissolution of Arsenic & Apple Pie, LLC, Plaintiff
26 has apparently not designed any more dolls on his own, nor has he worked as a
27 freelance doll designer for anyone else.

28

1 These facts support a finding that the *Graham* case is analogous to the case at bar, and
2 warrants a finding that the work for hire doctrine does apply.
3

4

5. **THE EVIDENCE THAT PLAINTIFF DESIGNED PRODUCT BOXES THAT ASSERTED**
6 **COPYRIGHT OWNERSHIP BY THE LLC, AND FAILED TO CLAIM COPYRIGHT**
7 **OWNERSHIP IN HIS BANKRUPTCY SCHEDULES, IS RELEVANT AND MATERIAL –**
8 **IT ESTABLISHES BY ESTOPPEL THAT PLAINTIFF NEVER ASSERTED**
9 **COPYRIGHT TO THE DOLL DESIGNS UNTIL THE LLC WAS DISSOLVED**

10 Plaintiff's Opposition, at page 9, argues that "The Copyright Publication Is Not Material to
11 the Issue of Copyright Ownership". Counsel goes on to argue that the defendants are wrong to
12 claim that "since the packaging had a copyright publication on it, Montwillo somehow assigned
13 his copyrights to AAP."

14 Defendants will give Plaintiff's counsel the benefit of the doubt here, and assume that
15 this argument does not purposely try to confuse the concepts of publication, and notice of
16 copyright ownership. The concept of publication in copyright law refers to when and how a
17 protected work is first made available to the public. The use of a notice of copyright, *ie*: ©,
18 represents a claim of ownership in the copyright of the work where the notice appears.

19 Defendants argument is that the placement of copyright notice, on every box containing
20 any of the dolls sold by AAP between 1997 and 2004, in which the notice made it clear to the
21 world that copyright ownership was held by Arsenic & Apple Pie" (hereafter "Arsenic"), supports
22 Defendants' claim that ownership of any protectible intellectual property interests in the doll
23 designs was held by Arsenic during this time. The fact that the product packaging containing
24 Arsenic's claim of copyright ownership was designed by the Plaintiff himself further supports
25 Defendants' claims not only of a transfer to Arsenic, but also of a waiver and abandonment of all
26 rights by Plaintiff.
27

1 At the very least, Plaintiff is estopped from asserting a copyright claim as to all dolls sold
2 in packaging displaying Arsenic's copyright claim, which covers all of the left-over inventory
3 given to Tull as part of Arsenic's dissolution, then sold to Gibby in July of 2004.

4 The related claim by Plaintiff that his failure to list the claimed copyrights on his
5 bankruptcy schedules is immaterial, is disingenuous sophistry at its best. Defendants do not
6 cite this fact as proof that the LLC owned the copyrights. It is cited as proof that Plaintiff
7 submitted a bankruptcy schedule in which he affirmatively asserted, under penalty of perjury,
8 that he did not own any copyrights as of 2003. Moreover, this admission to the Bankruptcy
9 Court directly contradicts his claim to have always owned and retained these rights since 1996,
10 as well as his insistence that he removed language from the Operating Agreement that would
11 have otherwise transferred those rights.

13 Plaintiff's counsel's argument that "Since Montwillo never made any money from the
14 copyrights, as a lay person it is natural he would not list them", is nonsense. Most assets
15 owned by people are not income generating. Applying counsel's logic, a debtor need not list
16 their home or automobile on their schedules, since these are also not income-generating
17 assets. There is nothing on the Schedule form that instructs debtors to refrain from listing
18 copyrights or other IP rights owned, if they aren't income generating. To the contrary, the law
19 clearly requires all assets to be listed, even if they appear to be of no value.

21 Moreover, Plaintiff's Opposition fails to address the serious nature of this
22 misrepresentation in his bankruptcy schedule. As was noted in Defendants' Opposition to
23 Plaintiffs Motion for Summary Judgment, the failure to list assets is grounds for the re-opening
24 of a bankruptcy estate. If Plaintiff does own any copyrights with value in this matter, they should
25 be transferred to a re-opened bankruptcy estate, and not to Plaintiff. Any other result would
26 allow Plaintiff to reap a windfall benefit from this misrepresentation.

1 **6. THE LACK OF ORIGINALITY IN PLAINTIFF'S DESIGNS SUPPORT A GRANT OF**
 2 **SUMMARY JUDGMENT**

3 Plaintiff vigorously argues that the doll designs in this case meet the minimal originality
 4 requirements of copyright law. Defendants have presented extensive argument on this issue,
 5 which need not be repeated. It is worth noting, however, that a key authority cited by Plaintiff in
 6 support of his claim, actually provides strong support for Defendants' claim.

7 Plaintiff cites *Nimmer on Copyright* for the proposition that "Unprotected scenes a faire
 8 elements are forms of expression which are inextricably linked to the underlying idea, and ideas
 9 are not copyrightable". (Plaintiff's Opposition at 11:11-13). Defendants could not agree more
 10 with Professor Nimmer on this subject – however it is a view that supports Defendants' motion,
 11 and not Plaintiff's.

12 As noted in previous filings in this case, the clothing and make-up design elements
 13 "created" by Plaintiff are all genre elements that signify that a given doll is either "trailer trash" or
 14 a "drag queen". Applying the definition of scenes a faire cited in *Nimmer* to these designs, is
 15 there really any argument that the red-and-white crop top, Daisy Duke jean shorts, blue eye-
 16 liner and blonde hair with dark roots are not common forms of expression that are inextricably
 17 tied to the idea of a "trailer trash" personna? Would Plaintiff be entitled to copyright protection
 18 for these clothing or make-up items on their own? Of course not. The same is true for the drag
 19 queen designs. A male doll dressed up in a blonde wig and a white dress to invoke a drag
 20 queen version of Marilyn Monroe is an unprotectible idea – and no copyright can be obtained to
 21 protect a blonde wig and a white dress.

22 Plaintiff's Opposition thus fails to raise a triable issue of fact by refusing to consider or
 23 address the basic issue of whether his copyright registrations are valid in the first place. As
 24 recognized recently in *Funky Films, Inc. v. Time Warner Entertainment Co., L.P.*, 462 F.3d.
 25 1072 (9th Cir. 2006) a plaintiff bringing a claim for copyright infringement must demonstrate (1)

1 ownership of a valid copyright, and (2) copying of constituent elements of the work that are
2 original. *Id.* at 1076. If either element is lacking, the claim is defective and is subject to
3 summary judgment. Since Ideas alone are not copyrightable, if the similarities that do exist are
4 confined to nonprotectable ideas, there is no infringement claim. 17 U.S.C.A. § 102(b).

5

6 **7. CONCLUSION**

7

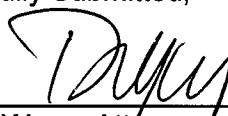
8 Plaintiff's Opposition to Defendants' Motion for Summary Judgment reeks of procedural
9 violations, was never timely filed or served in this proceeding, and must, for those reasons, be
10 stricken and disregarded.

11 On its merits, Plaintiff's Opposition also fails to raise any credible arguments that the
12 evidence adduced in this case, yields the conclusion that there is no triable issue of material fact
13 left in this case which can support a claim of copyright infringement. Plaintiff's case was filed
14 after the expiration of the statute of limitations, and to the extent the doll designs contain any
15 protectible elements, the right to that protection was transferred to Arsenic and thereafter to the
16 Defendants, either by the language of the Operating Agreement, or by application of the work
17 for hire doctrine. Finally, Defendants' have provided, in their motion, sufficient evidence to
18 support a finding that the designs at issue, in any event, lack sufficient originality and are based
19 on genre elements that the scenes a faire doctrine mandate may not be granted copyright
20 protection. For all of these reasons, Defendants are entitled to an Order granting their motion
21 for summary judgment.

22

23 Dated: April 11, 2008

24 Respectfully Submitted,

25 
26 David Y. Wong, Attorney at Law
27 Marc H. Greenberg, Attorney at Law
28 Attorneys for Defendants William Tull, Daniel Gibby
and Gibby Novelties, LLC